

BEFORE THE

OCT - 4 1993

Federal Communications Commission

WASHINGTON, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Redevelopment of Spectrum to
Encourage Innovation in the
Use of New Telecommunications
Technologies

ET Docket No. 92-9

To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION
OF THIRD REPORT AND ORDER**

The Public Safety Microwave Committee ("PSMC"), by its attorneys and pursuant to Section 1.429(i) of the Commission's rules, hereby seeks partial reconsideration of the Commission's Third Report and Order in the above-captioned proceeding, FCC 93-351 (released August 13, 1993), 58 Fed. Reg. 46547 (September 2, 1993).^{1/} The Commission must reconsider and reverse that portion of the Third Report and Order that will now force some State and local government public safety 2 GHz microwave facilities to relocate to other radio frequency bands. The Commission's arbitrary and capricious narrowing of the "public safety" exemption from forced relocation is inconsistent with express Congressional intent and the Commission's own long-standing definition of "public safety".

^{1/} PSMC, a coalition of public safety organizations and agencies, has participated in all stages of this and related proceedings regarding the reallocation of the 2 GHz band currently used by state and local governments for critical public safety communications.

049

The Commission's First Report and Order had excluded all State and local government entities from mandatory relocation of their 2 GHz microwave facilities. See First Report and Order and Third Notice of Proposed Rulemaking in ET Docket 92-9, 7 FCC Rcd 6886, 6891 (1992). However, in the Third Report and Order, the Commission modified the exemption, limiting it to facilities used for police, fire, or emergency medical services, provided that a "majority of communications" on the facilities are for "operations involving safety of life and property." Third Report and Order at ¶52. Microwave facilities licensed based upon eligibility in other Part 90 radio services otherwise recognized by the Commission as "Public Safety Radio Services" (i.e., Local Government, Forestry-Conservation, and Highway Maintenance) do not qualify for the modified exemption without a "demonstration that a majority of the communication carried on those facilities are used for operation involving safety of life and property." Id.^{2/}

As a result of the Commission's latest action, a State or local government microwave system providing the "backbone" for critical police, fire, and emergency medical mobile radio communications could be forced to relocate merely because those services constitute only 49% of the communications on the microwave system. Indeed, relocation would be required even though the other 51% of

^{2/} This provision also applies to facilities licensed based upon eligibility in the Special Emergency Radio Service under Part 90, Subpart C, of the Commission's rules.

communications on the system is for other Part 90, Subpart B, "Public Safety Radio Services."

I. THE COMMISSION'S MODIFICATION OF THE PUBLIC SAFETY EXEMPTION CONFLICTS WITH EXPRESS CONGRESSIONAL INTENT.

The Commission first recognized in its Notice of Proposed Rulemaking in this proceeding that "state and local government agencies would face special economic and operational considerations in relocating their 2 GHz licensed microwave operations to higher frequencies or alternative media." Notice of Proposed Rulemaking in ET-Docket 92-9, 7 FCC Rcd 1542, 1545 (1992) (emphasis added).

Thus, the Commission proposed to

exempt state and local government 2 GHz fixed microwave facilities from any mandatory transition periods. Rather, these facilities would be allowed to continue to operate at 2 GHz indefinitely, at the discretion of the state and local government licensees.

Id. (emphasis added)

Congress subsequently expressed grave concern that other existing 2 GHz microwave licensees would not be adequately protected in the reallocation process. The Senate adopted amendments to the FY1993 Senate Appropriations Bill for the FCC and other agencies (S.3026) that imposed restrictions on the Commission's reallocation of the 2 GHz band and provided for a detailed transition plan. Significantly, during Senate consideration of the Bill, Senator Dale Bumpers (D-Ark) offered a "perfecting amendment" that expressly excluded from mandatory relocation

any "State or local government, or agency thereof."^{3/}

Senator Bumpers' amendment, which was accepted by Senator Hollings, the floor manager for the bill, and adopted by the Senate without objection,^{4/} was intended to

preserve and codify the grandfathering of the right of State and local governments to retain the portions of the 2 GHz band of the radio spectrum which they now control for use by public safety agencies. This amendment will, in effect, write into law the current proposed rule of the Federal Communications Commission, issued last January, that provides for indefinite grandfathering of the rights of public safety users of the 2 GHz band. The FCC proposed rule would respect the priority of public safety users of the spectrum, as provided for by law.^{5/}

Therefore, the Senate clearly intended that all State and local government licensees be exempt from mandatory relocation.

The Commission responded to the Senate Bill by adopting the First Report and Order, incorporating much of the Senate's relocation plan. Significantly, the Commission stated that

we will exempt existing 2 GHz fixed microwave operations licensed to the public safety and special emergency radio services -- including state and local governments, police, fire and medical emergency communications -- from any involuntary relocation.

First Report and Order and Third Notice of Proposed Rulemaking in ET Docket 92-9, 7 FCC Rcd 6886, 6891 (1992).

^{3/} See 138 Cong. Rec. S10350 (statement of Sen. Hollings).

^{4/} 138 Cong. Rec. S10351.

^{5/} 138 Cong. Rec. S10350 (statement of Sen. Bumpers) (emphasis added).

Congress, apparently satisfied that the Commission was acting consistent with its intent, did not adopt final legislation on the issue.

Now, the Commission has reversed itself, imposing new restrictions on the public safety exemption. Rather than exempting all State and local government licensees, as it assured Congress it would do, and with the threat of legislation gone, the Commission has imposed an arbitrary and ill-defined test to limit the exemption to facilities on which a "majority of communications" are for the "protection of life and property." While PSMC and other public safety groups have argued that all State and local government activities and communications are ultimately for the protection of life and property, the Commission obviously plans to draw arbitrary distinctions between various State and local government functions. This is not what Congress intended in the FY1993 Senate Appropriations Bill. Nor is it consistent with the rules that the FCC led Congress to believe it would adopt when it persuaded Congress not to finalize legislation regarding microwave relocation. ^{6/}

^{6/} Furthermore, none of the timely filed petitions for reconsideration asked the Commission to narrow the public safety exemption. To the contrary, several parties sought to clarify that the exemption was sufficiently broad to include all entities eligible for licensing in Part 90, Subpart B radio services.

II. THERE IS NO RATIONAL BASIS FOR LIMITING THE EXEMPTION TO SYSTEMS ON WHICH A "MAJORITY OF COMMUNICATIONS" ARE FOR THE PROTECTION OF LIFE AND PROPERTY.

The Commission's new "majority of communications" test is particularly troublesome for the many State and local microwave systems shared among multiple government agencies. Often, a State or local government microwave system is designed primarily to satisfy the needs of a police or other emergency service agency. However, to spread the financial burden and to maximize the efficiency of the microwave facility, capacity on the system is often shared with other government agencies requiring point-to-point communications. Indeed, in some circumstances, a majority of the communications on such a mixed-use system may be for services other than police, fire, or emergency medical services. That fact, however, does not diminish the vital public safety use or nature of the overall microwave system.

There is no rational basis for the Commission's new "majority of communications" test. As the Commission recently reiterated in the Third Report and Order, "public safety" microwave facilities should not be forced to relocate because of the

economic and extraordinary procedural burdens, such as requirements for studies and multiple levels of approvals, that are often necessary to make changes in public safety systems as well as the unique importance of communications involved in the provision of police, fire, and emergency medical services.

Third Report and Order at ¶50. Yet, those same concerns apply whether "police, fire, and emergency medical services"

constitute 100%, 49% or 10% of the communications on a microwave system. For example, if a county-wide microwave system provides all of the "backbone" for the sheriff's mobile radio communications system, relocating that microwave system to another radio frequency band will be difficult and disruptive to vital public safety communications regardless whether the sheriff is the sole user of the system or whether it shares the system with other governmental entities. Indeed, relocating multiple user microwave facilities is likely to cause even greater "procedural burdens" than moving single user facilities.

III. THE COMMISSION'S NEW DISTINCTION AMONG PART 90, SUBPART B, PUBLIC SAFETY RADIO SERVICES IS AN ARBITRARY AND CAPRICIOUS DEVIATION FROM LONG-STANDING COMMISSION PRECEDENT.

The Commission's modified "public safety" exemption also makes arbitrary and unfounded distinctions between microwave systems licensed based upon eligibility in the Part 90, Subpart B, Police, Fire, and Emergency Medical radio services, and those based upon eligibility in the Part 90, Subpart B, Local Government, Forestry-Conservation, and Highway Maintenance radio services.^{2/} Yet all of these services are vital to the protection of life and property

^{2/} The Forestry-Conservation Communications Association ("FCCA") and the American Association of State Highway and Transportation Officials ("AASHTO") have also filed petitions for reconsideration on this aspect of the Commission's Third Report and Order.

and have been given equal treatment in FCC licensing matters up to now.

The Commission has overlooked the fact that, for administrative convenience, many police, fire, and emergency medical agency microwave systems are actually licensed based upon Local Government Radio Service eligibility. Other critical public safety services using Local Government Radio Service microwave facilities include correctional facilities, emergency and disaster management operations, transportation and building security, and hazardous materials management. These and other "Local Government" services protect the safety of life and property. Requiring state and local government licensees to demonstrate that fact on a case-by-case basis is a waste of scarce resources.

The Commission has also failed to recognize the inherent "public safety" nature of the Forestry-Conservation and Highway Maintenance Radio Services. For example, most entities eligible for the Forestry-Conservation service are agencies that provide basic law enforcement, fire suppression, and emergency medical services within State owned and controlled lands. Similarly, the Highway Maintenance Radio Service includes agencies that provide emergency road and bridge repairs, hazardous material spill cleanup, and snow removal critical to protecting the safety of travelers. Separating out these agencies from other "public safety" agencies is an unexplained arbitrary and capricious deviation from long-standing Commission policy.

IV. THE COMMISSION HAS CREATED AN "ADMINISTRATIVE NIGHTMARE"

The Commission has eliminated an easy to administer exemption for all State and local government agencies, adopting instead an inherently vague exemption for communications that "protect the safety of life and property." How is the Commission, a Federal agency, to make controversial value judgements that one State agency protects the safety of life and property, but a companion agency does not? How is the Commission to determine which communications protect the safety of life and property and which do not? While it may be easy for the Commission to defer these questions until disputes arise, there should be no doubt, absent a grant of this Petition, that the Commission will in fact soon become embroiled in the inherently difficult task of defining which State and local government communications protect the safety of life and property. Such disputes will unnecessarily tax the resources of the Commission, State and local governments and potential providers of new emerging technologies.


CONCLUSION

For the reasons stated above, PSMC urges the Commission to reconsider its modification of the "public safety" exemption from forced relocation from the 2 GHz microwave bands and to reinstate its prior exemption for all State and local government licensees.

Respectfully submitted,

PUBLIC SAFETY MICROWAVE COMMITTEE

By:


John D. Lane
Robert M. Gurss
WILKES, ARTIS, HEDRICK & LANE,
Chartered
1666 K Street, N.W.
Washington, D.C. 20006
(202) 457-7800

Its Attorneys

October 4, 1993